No. 16-3039

In the

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

APPELLANT'S BRIEF

Re

RICHARD D. SIMMONS,

Appellant,

versus

DAVID J. SHULKIN, M.D.,

Secretary of Veterans Affairs,

Appellee.

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Whether the Board correctly applied the provisions of 38 U.S.C. § 1111?

Statement of the Case

This matter arises from a request for revision of a VA decision which denied service connected compensation for a psychiatric disability. During service, there were symptoms and manifestations of a psychiatric disability and post service there was a medical opinion linking the inservice manifestations to a post service disability. The questions presented by this appeal are whether there was an entitlement to the benefit of the presumption of service connection, since there was a post service medical opinion relating the inservice symptoms and manifestations to a post service disability, as well as whether the benefit of the presumption of soundness applied.

Course of Proceedings Below

Mr. Simmons served in the United States Navy from November 4, 1968 to January 15, 1970. RBA 43. During Mr. Simmons' active duty service, he experienced chronic physical and emotional complaints. RBA 127-128, 129, and 130-131. As a result, Mr. Simmons was recommended for an administrative discharge based upon unsuitability. On December 7, 1972, the VA awarded Mr. Simmons a non service-connected pension, based upon a determination that Mr. Simmons was totally and permanently disabled as a result of polyarthritis in multiple joints, effective September 15, 1972. RBA 69-70.

In June 1974, Mr. Simmons filed an application for disability compensation for rheumatoid arthritis and mental depression. RBA 52. He was not then represented by a lawyer. On September 18, 1974, the VA denied Mr. Simmons disability compensation for both rheumatoid arthritis and a nervous condition with depressive features. RBA 1448-1449. On October 8, 1974, Mr. Simmons initiated an appeal with the filing of a notice of disagreement concerning the VA's decision to deny disability compensation, but did not complete his appeal, and the VA's September 18, 1974 decision became final.

On April 14, 2004, Mr. Simmons raised the issue of clear and unmistakable error in the VA's September 18, 1974 rating decision in a pleading to the Board of Veterans Appeals. RBA 502-517. In response, the Board, in August 2004, referred this issue to the VA regional office for further action. RBA 471-494 at 473. The VA took no action on the Board's referral. On December 21, 2005, Mr. Simmons filed a motion for revision of the September 18, 1974 rating decision in which he set out specific allegations of error. RBA 322-323 and 326-333.

On September 29, 2009, the VA submitted a rating decision denying revision of the VA's September 18, 1974 rating decision. RBA 313-317. On September 28, 2010, Mr. Simmons initiated an appeal, RBA 293-300, and on April 19, 2012 he completed his appeal. RBA 194-202. On March 11, 2015, the Board of Veterans Appeals incorrectly determined that the VA's September 18, 1974 rating decision was subsumed by the February 4, 1991 Board decision. RBA 183-192. Mr. Simmons appealed to this Court. *See* Vet. App. No. 15-2566.

On January 20, 2016, the VA agreed to and made a Joint Motion for Remand asking this Court to vacate the Board's March 2015 decision and directing the Board to adjudicate Mr. Simmons' appeal. RBA 137-141. On January 27, 2016, this Court granted the joint motion of the parties. RBA 142. On May 13, 2016, the Board denied Mr. Simmons' request for revision of the VA's September 18, 1974 decision. RBA 1-21.

Arguments

STANDARD OF REVIEW

This Court reviews claimed legal errors by the Board under the *de novo* standard, by which the Board's decision is not entitled to any deference. 38 U.S.C. § 7261(a)(1); *see Butts v. Brown*, 5 Vet. App. 532 (1993) (*en banc*). *See also Palmer v. Nicholson*, 21 Vet. App. 434, 436 (2007). This Court reviews *de novo* whether an applicable law or regulation was correctly applied. *Joyce v. Nicholson*, 19Vet.App. 36, 42-46 (2005). The Court will set aside a conclusion of law made by the Board when that conclusion is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Butts*, 5 Vet. App. at 538. The Court should determine whether the Board's decision, in which the Board misinterpreted the law, was not in accordance with the law.

In the case of a finding of material fact adverse to the claimant made by the Board in reaching its decision, the Court is required to hold unlawful and set aside or reverse such finding if the finding is clearly erroneous. 38 U.S.C. §7261(a)(4). *Padgett v. Nicholson*, 19 Vet. App. 133, 147 (2005). Here, the Board erred as a matter of law when it incorrectly applied the law, and a remand is the appropriate remedy, with instructions to the Board to correctly apply the law. *See Tucker v. West,* 11 Vet. App. 369, 374 (1998).

Summary of the Arguments

The Board incorrectly found that the VA had correctly applied the presumption of service connection under the provisions of 38 U.S.C. § 105(a) as well as the presumption of soundness under the provisions of 38 U.S.C. § 1111. But for this error, the Board would have been required to revise the VA's September 18, 1974 rating decision, which denied Mr. Simmons service connected compensation for an acquired psychiatric disability to include anxiety reaction with depressive features.

I.

The Board failed to correctly apply the provisions of 38 U.S.C. § 105.

In its May 13, 2016 decision, RBA 1-21, the Board indicated:

> Evidence of record at the time of the September 1974 RO rating decision included service treatment records, post-service treatment records, and an August 1974 VA mental health examination. **The Veteran's August 1968 service entrance examination reflects no psychiatric disability at service entrance**. An April 1969 service treatment record noted that the Veteran was treated after an attempted suicide. At that time, **the Veteran was diagnosed with "depressive reaction**." In a corresponding April 1969 service treatment record, the Veteran was diagnosed with "situational depression."

RBA 1-21 at 7-8. (emphasis added). Thus, the VA made two favorable findings of material fact: one, that Mr. Simmons' entrance examination to service failed to note any preexisting psychiatric condition; and two, that while on active duty Mr. Simmons was diagnosed with "depressive reaction." This Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority. *See* 38 U.S.C. § 7261(a)(4) (as amended by the Veterans Benefits Act of 2002, Pub. L. No.

107-330, § 401, 116 Stat. 2820, 2832 (Dec. 6, 2002) (providing for Court to reverse or set aside only findings of fact "adverse to the claimant") *See also Medrano v. Nicholson,* 21 Vet. App. 165 (2007).

The Board made a further favorable finding of material fact, as shown by the following:

> The Veteran received a VA psychiatric examination in August 1974. The examination report reflects that the Veteran advised feeling tense and nervous when stationed overseas onboard a ship. After separation from service, the Veteran conveyed getting along alright, but also having a little nervousness at times. Then, in 1971, the Veteran was diagnosed with rheumatoid arthritis. Subsequently, the Veteran began to regularly feel nervous and shaky. Upon examination it was noted that the Veteran appeared mildly depressed and moderately tense. **At the conclusion of the examination, the VA examiner diagnosed the Veteran with anxiety reaction with depressive features, and opined that the psychiatric disability was secondary to the diagnosed arthritic condition**.

RBA 1-21 at 8. As with the two earlier favorable findings of material fact, this Court is not permitted to reverse findings of fact favorable to Mr. Simmons made by the Board.

The Board also noted that: "Per the September 18, 1974 RO rating decision, the issue of service connection for 'polyarthritis variously diagnosed rheumatoid arthritis' was denied." RBA 1-21 at 9. The Board also noted that the VA in its September 18, 1974 rating decision also denied Mr. Simmons service connection for anxiety reaction with depressive features on a direct as well as a presumptive basis. *Id.* And, instead of addressing Mr. Simmons' allegations of clear and unmistakable error that the VA failed to correctly apply the provisions of 38 U.S.C. §§ 105(a) and 1111, the Board concluded:

> Here, the Veteran has offered no argument that the RO made

> an error of fact or law in applying 38 C.F.R. § 3.303(c) and 38 C.F.R. § 4.9 to find that the Veteran's in-service diagnosis of immature personality was a personality disorder not subject to service connection under the law. Even assuming, arguendo, that the RO did err in its application of 38 C.F.R. § 3.303(b), 38 U.S.C.A. § 105(a), and/or 38 U.S.C.A. § 1111, service connection would still have been barred under 38 C.F.R. § 3.303(c) and 38 C.F.R. § 4.9; therefore, it cannot be said that any error under 38 C.F.R. § 3.303(b), 38 U.S.CA. § 105(a), and/or 38 U.S.C.A. § 1111 would have manifestly changed the outcome as to the denial of service connection for an immature personality disorder. Absent any argument from the representative that the RO erred in its application of 38 C.F.R. § 3.303(c) and 38 C.F.R. § 4.9, CUE has not been showed in the September 18, 1974 RO rating decision as to the issue of service connection for the acquired psychiatric disorder of immature personality disorder. *Damrel*, 6 Vet. App. at 245; *Fugo*, 6 Vet. App. at 43-44.

RBA 1-21 at 10.

This conclusion does not address Mr. Simmons' allegations of clear and unmistakable error, which was that the VA failed to correctly apply the provisions of 38 U.S.C. §§ 105(a) and 1111 in the VA in its September 18, 1974 rating decision which denied Mr. Simmons service connection for anxiety reaction with depressive features on a presumptive basis. The Board's conclusion only addressed the VA's rationale for its September 18, 1974 rating decision of service connected compensation, that an in-service diagnosis of immature personality was a personality disorder not subject to service connection under the law.

The Board eventually noted:

> The Veteran has also argued that the RO failed to consider and apply the statutory presumptions under 38 U.S.C.A. § 105(a) and 1111. In multiple briefs throughout the course of this appeal, the Veteran and representative have alleged that symptoms, manifestations, and diagnoses during service of a

> mental health disorder should have triggered VA' s consideration of the presumption of service connection under 38 U.S.C.A. § 105(a). The Veteran further contended having entitlement to the benefit of presumption of soundness under 38 U.S.C.A. § 1111, as no pre-existing mental health disorder was noted on the service entrance examination. The Veteran also alleged that evidence of record extant at the time was legally insufficient to rebut the presumption of soundness and did not contain clear and unmistakable evidence that the moving party had a pre-existing mental health disorder that was not aggravated by such service. It is contended that had the Board correctly applied the extant statutory or regulatory provisions, the outcome would have been manifestly different and the moving party would have been granted service connection for the resulting post-service psychiatric disability, then diagnosed as anxiety reaction with depressive features, based on presumptive statutory provisions.

RBA 1-21 at 14. The Board addressed Mr. Simmons' allegation of clear and unmistakable error in the VA's September 18, 1974 rating decision based on the failure to correctly apply the provisions of 38 U.S.C. § 105(a) as follows:

> The Board finds that the September 18, 1974 RO rating decision is consistent with 38 C.F.R.(sic) § 105(a) and the applicable laws and regulations extant at that time. In evaluating the medical evidence, the RO gave significant weight to the August 1974 VA mental health examination in which a VA examiner opined that the currently diagnosed mental disability of anxiety reaction with depressive features was caused by a non-service-connected arthritis disability. As the Veteran was not service connected for an arthritis disability, and as there was no evidence of record indicating that the anxiety reaction with depressive features may have been related to the Veteran's in-service mental health symptoms, service connection was denied.

RBA 1-21 at 15-16.

A finding by the Board that the VA's September 18, 1974 rating decision was **consistent** with 38 U.S.C. § 105(a) and the applicable laws and regulations extant at that

time was not a finding that it was "correctly applied." The Board **did not** address whether the presumption of service connection was triggered by the undisputed fact that while on active duty Mr. Simmons was diagnosed with "depressive reaction." RBA 1-21 at 8 and RBA 127-128.

The Board's error in failing to correctly apply the provisions of 38 U.S.C. § 105(a) is shown by the following:

> In order to obtain the benefit of the 38 C.F.R.(sic) § 105 presumption of service connection, the evidence must first demonstrate that there is a mental health disability incurred in service. *Shedden*, 381 F.3d at 1167. **The mere presence of symptoms in service, in and of itself, overlooks the fact that medical evidence of record included an opinion that the diagnosed mental disability of anxiety reaction with depressive features was secondary to a non-service-connected arthritis disability**. The presumption of 38 U.S.C.A. § 105 did not apply, so there was no CUE on the part of the Board in denying the claim. *Id.*

RBA 1-21 at 16. (emphasis added). The record before the Board, however, included more than "[t]he mere presence of symptoms in service"; the record before the Board included a diagnosis of "depressive reaction." RBA 127-128. Under the correct application of § 105(a), the diagnosis of a psychiatric disability triggered the presumption of service connection under § 105(a).

The Board correctly cited to the decision in *Shedden v. Principi*, 381 F.3d 1163 (Fed. Cir. 2004) for the proposition that:

> In order to obtain the benefit of the 38 C.F.R.(sic) § 105 presumption of service connection, the evidence must first demonstrate that there is a mental health disability incurred in service. *Shedden*, 381 F.3d at 1167.

RBA 1-21 at 16. However, the Board made a clear error of law in its application of §

105(a) when it failed to recognize that the record before the Board included evidence, in the form of a diagnosis of "depressive reaction," RBA 127-128, which did in fact demonstrate that there was a mental health disability incurred in service. Thus, the Board's finding that the presumption of 38 U.S.C. § 105(a) did not apply was clearly erroneous and must be set aside as unlawful.

The Federal Circuit in *Shedden* explained:

> . . . while section 105(a) establishes a presumption that the disease or injury incurred during active duty is service-connected, **the veteran seeking compensation must still show the existence of a present disability and that there is a causal relationship between the present disability and the injury, disease, or aggravation of a preexisting injury or disease incurred during active duty**. *See also Dambach v. Gober*, 223 F.3d 1376, 1380 (Fed.Cir.2000) (explaining that under 38 U.S.C. 1154(b) a veteran may proffer satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease to establish the causal relationship and other requirements for service connection (quoting *Collette v. Brown*, 82 F.3d 389, 393 (Fed.Cir.1996))). However, there is not, as the government contended at oral argument, any requirement to show a causal relationship between the present disability and the particular event or circumstance that gave rise to the in-service injury or aggravation.

Shedden, 381 F.3d 1167. (footnote omitted)(emphasis added).

At the time Mr. Simmons was seeking service connected compensation for his post service disabilities, the evidence of record did show the existence of a present disability, arthritis and depression, and that there was a causal relationship between these present disabilities and the mental disease,"depressive reaction," incurred during his period of active duty. The evidence of record at the time of the VA's September 18, 1974 rating decision was a medical opinion from Jeffress G Palmer, M. D. dated June

4, 1974. RBA 49.

Dr. Palmer unambiguously opined:

> I believe it is a reasonable presumption that **the illness manifested as mental depression during that time is the same illness now being manifested as arthritis involving multiple joints**.

Id. (emphasis added). Dr. Palmer explained:

> There are no records of studies such as sedimentation rate to indicate whether an occult inflammatory disease was present during his service and which would tend to exclude an underlying inflammatory disorder. In view of the relatively brief time from his discharge until the onset of his arthritis I therefore believe it likely that the chronic disorder he now has was present at the time of his military service.

Id. Dr. Palmer's medical opinion provided the necessary causal relationship between Mr. Simmons' post service disabilities and the mental disease diagnosis during service. Dr. Palmer's medical opinion provided the required satisfactory evidence of service incurrence of his post service disabilities to establish the causal relationship and other requirements for service connection provided by the presumption under § 105(a). Thus, the Board made a clear error of law when it incorrectly concluded that: "The presumption of 38 U.S.C.A. § 105 did not apply . . .." RBA 1-21 at 16. The presumption under § 105(a) did apply and the VA in its September 19, 1974 rating decision made a clear and unmistakable error when it failed to afford Mr. Simmons the benefit of the presumption of service connection.

II.

The Board failed to correctly apply the provisions of 38 U.S.C. § 1111.

The Board also made a clear and unmistakable error in its September 19, 1974

rating decision when it failed to afford Mr. Simmons the benefit of the presumption of soundness, as required by the provisions of 38 U.S.C. § 1111, as shown by the following Board discussion:

> The September 18, 1974 RO rating decision did not raise the issue of presumption of soundness and/or discuss preexistence under 38 U.S.C.A. § 1111 as the decision was a direct service connection denial under 38 C.F.R. § 3.303(a), (d), and the RO did not need to make a finding that a non-personality psychiatric disorder preexisted service. As there was no finding of preexistence to service, 38 U.S.C.A. § 1111 and 38 C.F.R. § 3.304 are not applicable; therefore, as the RO never applied 38 U.S.C.A. § 1111/38 C.F.R. § 3.3 04 against the claim, this argument is meritless.
>
> The case before the RO in 1974 did not raise application of the presumption of soundness. This is not an aggravation case and preexistence of a psychiatric disorder was not raised by the evidence and was not decided by the RO in September 1974. The representative's argument is an attempt to have the extremely high burden on VA (of clear and unmistakable evidence to prove non-aggravation) of 38 U.S.C.A. § 1111/38 C.F.R. § 3.304 applied to this direct service connection case where preexistence of a disability is not at issue. The fact that the diagnosis of a personality disorder shows that the disorder inherently preexisted service is controlled by the personality disorder regulations (VAOPGCPREC 82-90; 38 C.F.R. § 3.303(c), 4.9). The representative's arguments that a personality disorder was not "noted" at service entrance are irrelevant to this direct service connection case, and arguing that noting is required when it is not does not convert the case from one for direct service connection (whether the disorder was directly incurred in service, applying 38 C.F.R. § 3.303(a) and (d)) to one for preexistence and aggravation under 38 U.S.C.A. § 1111 and 38 C.F.R. § 3.304.

RBA 1-21 at 17. The Board, as it did with the presumption under § 105(a), seeks to evade the VA's obligation to apply the presumption of soundness because of the existence of a diagnosis of a personality disorder in the record.

Under this erroneous view, a veteran's right to be presumed sound at entrance to service is inapplicable when during service he is diagnosed with a mental disease, of "depressive reaction," RBA 127-128, because these service medical records also include a diagnosis of a personality disorder. There is no authority in any statute, regulation or case law which supports such a view. "[T]o invoke the presumption of soundness, a claimant must show that he or she suffered from a disease or injury while in service." *Horn v. Shinseki*, 25 Vet. App. 231, 236 (2012); *see Holton v. Shinseki*, 557 F.3d 1362, 1367 (Fed. Cir. 2009) (explaining that the application of the presumption of sound condition does not "relieve the veteran of the burden of showing that the veteran suffered from a disease or injury while in service"); *Dye v. Mansfield*, 504 F.3d 1289, 1293 (Fed. Cir. 2007) ("The presumption of sound condition addresses the situation where a question arises whether a veteran's medical problems that arose during service existed before he joined the armed forces and, therefore, were not incurred in [the] line of duty." (Emphasis added) (internal quotation marks omitted). In other words, "before the presumption of soundness is for application, there must be evidence that a disease or injury that was not noted upon entry to service manifested or was incurred in service." *Gilbert v. Shinseki*, 26 Vet.App. 48, 52 (2012).

There is no dispute that during service Mr. Simmons had symptoms and manifestations of his post service depression and this evidence was of record in 1974. RBA 127-128, 129, and 130-131. Equally, there is no dispute that Mr. Simmons' entrance examination to service did not note any pre-existing psychiatric disability. RBA 121-122. Therefore, contrary to the Board's determination, Mr. Simmons was entitled

to the benefit of the presumption of soundness because there was evidence that a mental disease, "depressive reaction," was not noted upon entry to service and his depression manifested in service. *See* RBA 49. But, Mr. Simmons was later diagnosed while he served on active duty, thereby showing that he did suffer from a mental disease while in service. *See Horn*, *supra*.

The Board was required to and did not correctly apply all potentially applicable provisions of law and regulation. The Board is not free to ignore issues that a veteran raises during the course of an appeal. *Godfrey v. Derwinski*, 2 Vet. App. 352, 357 (1992). The Board must consider all relevant evidence of record and discuss all "potentially applicable" laws and regulations. *Gutierrez v. Principi*, 19 Vet.App. 1, 7 (2004); *Majeed v. Principi*, 16 Vet.App. 421, 431 (2002); *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991); *see* 38 U.S.C. § 7104. The Board here failed to correctly apply the presumption of soundness and that was a clear error of law based on the indisputable facts before the Board.

CONCLUSION

The Board made a clear error of law in failing to correctly apply the provisions of 38 U.S.C. § 105 and by failing to correctly apply the presumption of soundness in consideration of Mr. Simmons' request for revision of the VA's September 18, 1974 rating decision. The Board's decision must be set aside as unlawful and remanded to the Board, with instructions from this Court to correctly apply the presumption of service connection under 38 U.S.C. § 105(a) and the presumption of soundness under the provisions of 38 U.S.C. § 1111.

Respectfully submitted by:

/s/Kenneth M. Carpenter
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Electronically filled on March 16, 2017